Te Tari -o- Ngā Kaitiaki Mana Tangata

PV/O

Our Ref: 315749

Contact: Leanne Stewart

31 October 2011

Mr Felix Marwick Newstalk ZB Press Gallery Parliament Buildings Wellington 6160

Dear Mr Marwick

OFFICIAL INFORMATION ACT COMPLAINT NZSIS

I refer to my letter of 23 August 2011.

Ms Wakem has met with Dr Tucker to discuss your complaint. In her temporary absence from the Office, she has asked me to convey to you her provisional view.

### Summary

Dr Tucker has advised Ms Wakem that he is prepared to release a statement regarding his discussion with the Prime Minister. It is Ms Wakem's provisional view that the NZSIS has good reason to withhold Dr Tucker's full recollection of the discussion pursuant to section 9(2)(g)(i) of the Official Information Act 1982.

At this stage, Ms Wakem is willing to consider any further comments you may wish to make before she decides whether to confirm this as her opinion on the matter.

If you do wish to comment, please respond within the next four weeks.

I have set out the details of the provisional view below.

### Background

On 4 August 2011 you asked Dr Tucker for:

"copies of any and all correspondence [the SIS] had with the Government and the Office of the Prime Minister regarding its decision to release information to Mr Cameron Slater".

# On 5 August 2011 Dr Tucker replied as follows:

"I am declining your request for copies of any and all correspondence with the Government and the office of the Prime Minister regarding [the SIS] decision to release information because of the need to protect the confidentiality of advice tendered to officials. I can say, however, that I notified both the Leader of the Opposition and the Prime Minister's office that I was going to release the information."

### Information at issue

There is no written correspondence with the Government and the Office of the Prime Minister regarding the NZSIS decision to release information to Mr Cameron Slater.

However, Dr Tucker is prepared to provide you with a written statement in response to your request and you will receive this shortly.

## **Provisional View**

Ms Wakem is of the view that there is good reason to withhold Dr Tucker's full recollection of his <u>discussion with the Prime Minister</u> pursuant to section 9(2)(g)(i). This section provides (relevantly) for the withholding of information where this is necessary to "maintain the effective conduct of public affairs through the free and frank expression of opinions by... or to Ministers of the Crown... in the course of their duty".

The Ombudsmen hold the view that comments generated during the decision making process on OIA requests may be withheld to protect this interest. The rationale behind the withholding is to protect the robustness of the decision making process. It is in the interests of the effective conduct of public affairs for there to be no constraint in either the discussion or recording of the reasons or recommendations for making particular decisions on OIA requests.

Regarding the question of countervailing public interest considerations favouring disclosure of such information, one might suggest that disclosure would serve a public interest in ensuring decision-makers are accountable for the decisions they make on OIA requests. However, the Ombudsmen consider this interest is largely served because the mechanism exists for an Ombudsman's independent investigation and review of such decisions.

The public interest in non-disclosure of this kind of information has also been noted in the Australian Administrative Appeals Tribunal (Re: F E PETERS and: PUBLIC SERVICE BOARD and DEPARTMENT OF PRIME MINISTER AND CABINET (No. 4) No. A83/53 and A83/77 AAT No. 2751 refers):

"23. There is, in my view, a public interest in ensuring that requests for access under the FOI Act are dealt with promptly and properly by the agencies or Ministers to whom those requests are directed. To that extent, there is a public interest in favour of disclosure of documents which would disclose how an agency has responded to such a request and how it has responded to an application for external review of its decision to

refuse access. On the other hand, however, there is, in my view, a public interest in ensuring that an agency is not unduly constrained in its capacity to respond promptly and properly to a request for access or to an application for review, by a concern that documents canvassing the difficult issues that may arise in such circumstances will be accessible under the Act.

24. The Tribunal's experience in FOI matters indicates that there will often be conflicting views within an agency about the accessibility of particular documents under the Act. It is in the nature of such matters that in the Departmental submissions passing from one level to another within the Public Service hierarchy, the views and recommendations originally expressed undergo modification and refinement or even rejection before a final decision in the matter is taken. Where the ultimate decision with respect to exemption is itself then subject to external review before the Tribunal and where the agency is therefore accountable for its ultimate decision, including the reasons, there are, in my view, strong grounds for concluding that it is contrary to the public interest to expose the internal deliberations of the agency to public scrutiny. Particularly is that so where the agency decision has been upheld on review".

In the circumstances of this case, Ms Wakem has not identified a public interest in disclosure which would outweigh the interest in withholding the details of the discussion.

Ms Wakem is happy to consider any comments you may wish to make before she forms a final view on this matter. If you do wish to comment, please respond within the next four weeks.

Yours sincerely

Leo Donnelly
Deputy Ombudsman